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Province of
British Columbia

Report on

Interspousal Immunity in Tort

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON INTERSPOUSAL IMMUNITY IN TORT

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Allan Williams, Q.C.,
Attorney General of the Province
of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
INTERSPOUSAL IMMUNITY IN TORT

In the Province of British Columbia, one spouse cannot sue the other in tort. This rule is enshrined in section 10 of the *Married Women's Property Act*. When first enacted almost 100 years ago, this provision represented an improvement over an even more restrictive common law position. Today the rule is an anachronism.

In this Report we examine the rule and its consequences. We recommend its replacement by a new and modern statement of the law concerning the rights of spouses to sue each other. We also examine the implications of a change in the rule, and make recommendations with respect to insurance legislation, insurance contracts and contributory fault.

CHAPTER I

INTRODUCTION

At common law, a husband and wife were regarded as one person and the legal existence of the wife, during marriage, was regarded as merged into that of the husband.[1] This "doctrine of unity" formed the basis of two rules. First, as a matter of substantive law, a tort committed by one spouse against the other could not be a source of liability. Second, as a matter of procedure, neither spouse could sue the other during the marriage—you cannot sue yourself.[2] As Fleming points out,[3] the first rule precluded any action for a tort committed by one spouse against the other during marriage, regardless of when the suit was instituted even if it be after divorce. The second rule enjoined all litigation between husband and wife during the marriage for torts committed before the marriage as well as torts committed during the marriage.

In the late nineteenth century these rules were modified in England by the *Married Women's Property Act 1882*.[4] In 1887 a *Married Women's Property Act*[5] was enacted in British Columbia which was largely based on the English legislation. That Act remains in substantially the same form today.

The key sections of the current *Married Woman's Property Act*[6] are sections 3 and 10. Section 3 provides:

> **May bind her separate estate by contracts, and may sue and be sued**
>
> **3.** (1) A married woman is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a single woman, and her husband need not be joined with her as plaintiff or defendant, or be made a party to an action or other legal proceeding brought by or taken against her.
>
> (2) Damages or costs recovered by a married woman in an action or proceeding are her separate property and damages or costs recovered against her in an action or proceeding are payable out of her separate property and not otherwise.

This section effectively abolishes the common law procedural rule, allowing a married woman to sue or be sued in her own name without her husband being a party to the litigation.

Section 10 provides:

> **Remedies of married women for protection and security of property**
>
> **10.** (1) Every married woman shall have in her own name against all persons, including her husband, the same remedies for the protection and security of her own separate property as if the property belonged to her as a single woman.
>
> (2) In proceedings under this section it is sufficient to allege that the property referred to in subsection (1) is the property of the married woman.
>
> (3) Except as aforesaid, no husband or wife is entitled to sue the other for a tort.
>
> (4) In proceedings under this section a husband or wife is competent to give evidence against each other.

This section modified the substantive rule to the extent that it gives a married woman the same remedies as an unmarried woman for the protection of her separate property. Subject to this exception, however, section 10 (3) reaffirms

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[1] *Allen* v. *Nolet*, (1967) 60 W.W.R. 247 (B.C.C.A.); *see also* Glanville Williams, *The Legal Unity of Husband and Wife*, (1947) 10 M.L.R. 16.

[2] *Minaker* v. *Minaker*, [1949] S.C.R. 397.

[3] John G. Fleming, *The Law of Torts*, 592 (4th ed.).

[4] 45 & 46 Vict. c. 75.

[5] S.B.C. 1887 c. 20; for earlier legislation in British Columbia, *see*, *An Act to Protect the Property of a Wife Deserted by Her Husband*, 1862, c. 116, the *Married Women's Property Act*, S.B.C. 1873, c. 29, and *Act to Amend the "Married Women's Property Act, 1873,"* S.B.C. 1883, c. 18.

[6] R.S.B.C. 1979, c. 252.

the common law by the unequivocal declaration that "no husband or wife is entitled to sue the other for a tort." It is this rule that is addressed in this Report.

We acknowledge that this topic has been studied extensively in other jurisdictions. Law reform bodies in other Provinces[7] and other parts of the Commonwealth[8] have studied this subject, as have several academics.[9] We have been assisted greatly by and have drawn heavily on these studies to avoid as much as possible duplication of effort. By drawing on the work of others, we have been able to reduce significantly the time necessary to complete this study and to focus our immediate attention on the issues involved.

In June 1982 we circulated a Working Paper setting out tentative proposals for changes in the law relating to interspousal immunity in tort and related issues.[10] The response which we received, while not large, generally agreed with the proposals and was helpful on points of detail.

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[7] *See* Ontario Law Reform Commission, *Report on Family Law, Part I: Torts*, (1969); Newfoundland, *Report on Family Law Study, Project XII, Some Aspects of Torts in Family Law*, (1970) 68-85; Manitoba Law Reform Commission, *Report on Abolition of Interspousal Immunity in Tort*, (1972); Institute of Law Research and Reform, The University of Alberta, *Report No. 33, Interspousal Tort Immunity*, (1979); Law Reform Commission of Saskatchewan, *Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts*, (1979).

[8] Law Reform Committee (England), *Ninth Report, Liability in Tort between Husband and Wife*, (1961) Cmnd. 1268; Law Reform Commission of Western Australia, *Report on the Immunity of Suit Between Husband and Wife*, (1973); Law Reform Committee of South Australia, *Fourth Report Section 118 of the Motor Vehicle Act, (1959-1968)* (1969), *Eleventh Report, Law Relating to Women and Women's Rights*, (1970); Chief Justice's Law Reform Committee, Victoria, *Report on Actions in Tort between Husband and Wife*, (1964); Jamaica Law Reform Committee, Report 13 on *Actions in Tort by one Spouse Against the Other;* The Law Commission of Trinidad and Tobago, *Third Report on the Consolidation and Amendment of the Law Relating to the Capacity, Property and Liabilities of Married Women and the Liabilities of Husbands*, (1976).

[9] *See, e.g.*, Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, (1952) 15 M.L.R. 133; Glanville Williams, *The Legal Unity of Husband and Wife, supra*, n. 1; *Some Reforms in the Law of Tort* (1961) 24 M.L.R. 101; and more recently in Canada, D. Mendes Da Costa, *Husband and Wife in the Law of Torts, Studies in Canadian Tort Law*, (1968) ed. by A.M. Linden 470-437; and S.J. Bailey, *Interfamily Tort Immunity*, (1978) 16 Alta. L. Rev. 417.

[10] Law Reform Commission of British Columbia, Interspousal Immunity in Tort (Working Paper No. 34, 1982).

Although, as a general rule, a husband or a wife is not entitled to sue the other in tort, a married woman may, during the marriage, sue her husband in tort for the protection and security of her separate property. It should be noted that no such exception is created in favour of married men.[1] On the whole, the courts have been disinclined to give a generous interpretation to this exception.[2] Thus a wife cannot sue her husband for false imprisonment, malicious prosecution,[3] deceit,[4] fraudulent conspiracy,[5] libel,[6] assault[7] or personal injuries occasioned by her husband's negligence.[8] On occasion, however, the courts have given "a fair, large and liberal" interpretation to section 10.[9] In *Allen* v. *Nolet*,[10] for example, the British Columbia Court of Appeal held that a claim for indemnity by a wife against a husband is maintainable, because a judgment against the wife would affect her separate property and the indemnity claim would therefore be for the protection and security of that property.[11] Moreover, in British Columbia, although a husband is not liable to his wife for her general damages occasioned by his negligent driving, there is some authority for the view that he is liable for her special damages.[12]

Because property is defined in the Act as including a "thing in action",[13] a wife may, during her marriage, sue her husband for injury caused to her by his negligence before marriage.[14] It would also appear to be settled in British Columbia that a former wife whose marriage is terminated by divorce or annulment may sue her former husband for damages sustained as a result of a tort committed by him during the marriage.[15] Moreover, if a husband, while acting as a servant or agent of a third party, commits a tort resulting in injury to his wife, the wife can recover against the third party.[16]

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[1] Salmond was of the opinion that it was a mere oversight that the statute did not in this respect confer on the husband a right similar to that conferred upon his wife. *Law of Torts*, (7th ed.) 88.

[2] For a detailed analysis of the present law, *see* Mendes da Costa, Husband and Wife in the Law of Torts, *Studies in Canadian Tort Law*; (1968) ed. by A.M. Linden, 470-437.

[3] *Tinkley* v. *Tinkley*, (1909) 25 T.L.R. 264; in this case a wife living apart from her husband had lost her employment as a result of false accusations of theft made by him. She was denied any redress.

[4] *Phillips* v. *Phillips*, (1962) 31 D.L.R. (2d) 546 (Ont. H. Ct.).

[5] *Guinness* v. *Guinness*, (1977) 81 D.L.R. (3d) 741 (Ont. H. Ct.).

[6] *Ralston* v. *Ralston*, [1903] 2 K.B. 238.

[7] *Phillips* v. *Burnet*, (1876) 1 Q.B.D. 436.

[8] *Macklin* v. *Young*, [1933] S.C.R. 603; *Ferguson* v. *MacDonald*, [1949] 2 W.W.R. 1130 (B.C.C.A.).

[9] *Allen* v. *Nolet*, (1967) 60 W.W.R. 247 (B.C.C.A.) per McFarlane J.A. at 249-250; *see also Strang* v. *Cheney*, (1981) 123 D.L.R. (3d) 735 (Alta. C.A.).

[10] *Ibid.*

[11] In this case the plaintiff had commenced proceedings against a husband and wife. The plaintiff alleged that she was injured as a result of the husband's negligent operation of a motor vehicle owned by the wife but driven without her consent. If the plaintiff was successful, the wife would have been liable as owner of the motor vehicle under the provision of s. 70 *Motor Vehicle Act*, R.S.B.C. 1960, c. 253. The wife, by a third party notice, sought an indemnity from the husband in respect of any judgment that might be obtained against her.

[12] *Duckhorn* v. *Duckhorn*, (1977) 2 B.C.L.R. 296 (B.C.S.C.).

[13] *Married Woman's Property Act*, R.S.B.C. 1979, c. 252, s. 1.

[14] *Landstrom* v. *Ringrose*, (1981) 27 B.C.L.R. 339 (B.C.C.A.)

[15] *Imperaderio* v. *Imperaderio*, (1977) 76 D.L.R. (3d) 765 (B.C.S.C.); *see also Mendes* v. *Ferreira*, [1981] 4 W.W.R. 276 (B.C.S.C.) (void marriage).

[16] *See, e.g., Smith* v. *Moss*, [1940] 1 K.B. 424; *Broom* v. *Morgan*, [1953] 1 Q.B. 597 (C.A.).

A. England and Other Commonwealth Countries

Interspousal immunity in tort was abolished in England (and Scotland) in 1962.[1] The court, however, has a discretion to stay an action in tort between husband and wife if no substantial benefit would accrue to either party from continuation of the proceedings, or if the issue could more conveniently be dealt with on an application under statutory provisions similar to section 26 of the British Columbia *Married Woman's Property Act*.[2] Under this section the court may decide any question between husband and wife as to ownership or possession of property in a summary way.

The full text of the English Act is set out in Appendix A. It is based upon recommendations made by the Law Reform Committee in 1961.[3] The legislation has provided a model for reform in New Zealand, Tasmania, Queensland and South Australia.[4] In recommending that the court should have a discretion to stay actions for what are essentially petty squabbles, the Law Reform Committee said:[5]

> We think that to allow complete freedom of action in tort would be undesirable as a matter of general social policy. The strains which are liable to be set up and the troubles which are liable to arise when two people are living together in the constant close proximity of marriage produce a situation that should not be regarded merely from a narrow legal point of view. If either spouse were able without let or hindrance to bring an action in tort against the other in respect of injuries of a personal nature, it might easily lead to harmful results. Litigation in respect of petty acts of negligence in the domestic sphere would certainly not be conducive to the continuance of the marriage and would, we think, do nothing but harm.

The Committee further stated:[6]

> The reason for giving the court power to stay proceedings is that the law should not too readily lend its aid to the airing of petty grievances between husband and wife. This applies even though the parties may no longer be cohabiting, for there may even in these circumstances be some possibility of reconciliation between them or, where there is not, litigation may serve only as an excuse for the airing of matrimonial grievances and bitterness. We think, therefore, that the power to stay should be exercisable in the case of torts committed after the parties have ceased to cohabit as well as in the case of torts committed during cohabitation, but should apply only to actions brought during the subsistence of the marriage. The power to stay should also apply in the case of an antenuptial tort, though it is most unlikely that there would ever be occasion to stay proceedings in these circumstances, for it is difficult to conceive that one spouse would wish to sue the other in respect of a tort committed before the marriage except where the claim was in substance one against the other spouse's insurance company.

In Victoria and the Australian Capital Territory, interspousal immunity has also been abolished but without giving the court a discretion to stay trivial proceedings.[7]

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[1] Law Reform (Husband and Wife) Act 1962, 10 & 11 Eliz. 2, c. 48.

[2] R.S.B.C. 1979, c. 252.

[3] *Ninth Report, Liability in Tort between Husband and Wife*, (1961) Cmnd. 1268.

[4] Law Reform Commission of Western Australia, *Report on the Immunity of Suit between Husband and Wife*, (1973) 2.

[5] *Supra*, n. 3 at 5.

[6] *Ibid.* 6-7.

[7] *Supra*, n. 4.

B. Canada

Interspousal immunity has been abolished in Ontario,[8] Manitoba[9] and Prince Edward Island.[10] Abolition has also been recommended in Alberta,[11] Saskatchewan[12] and Newfoundland.[13]

In 1973 a Bill entitled the *Married Person's Equality Act*[14] was introduced in the British Columbia Legislature, one effect of which would have been to abolish interspousal immunity in tort. The full text of this Bill is set out in Appendix B. This Bill did not advance beyond first reading.

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[8] *An Act to Amend certain Laws founded upon Marital or Family Relationships*, S.O. 1975, c. 41 consolidated by *The Family Law Reform Act*, S.O. 1978, c. 2, s. 65, now R.S.O. 1980, c. 152, s. 65.

[9] *An Act to Amend the Married Women's Property Act*, S.M. 1973, c. 12.

[10] *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 60.

[11] Institute of Law Research and Reform, The University of Alberta, *Report No. 33, Interspousal Tort Immunity*, (1979).

[12] Law Reform Commission of Saskatchewan, *Proposals for Reform of Law Affecting Liability Between Husband and Wife and Related Insurance Contracts*, (1979).

[13] Newfoundland, *Report on Family Law Study, Project XII, Some Aspects of Torts in Family Law*, (1970) 68-85.

[14] 1973 (2nd Session) Bill No. 1.

A. General

In *Landstrom* v. *Ringrose*,[1] Lambert J.A. of the British Columbia Court of Appeal stated that the law is "crying out for reform," and pointed out that:

> A wife can not obtain a remedy against her husband and a husband can not obtain a remedy against his wife, while they are married, for personal injuries sustained during the marriage. There equality of treatment ends. A wife can sue her husband during marriage to protect her separate property. A husband can not sue his wife to protect his separate property. If the tort was committed before marriage the situation is the same. If the woman's property is injured by the man, she can begin an action against him either before or after marriage and obtain judgment and a remedy after marriage. If the man's property is injured before marriage he can sue before marriage but not after marriage and he can not obtain judgment or a remedy after marriage. So the present law is not, to my mind, in accordance with current conceptions of equality of treatment of men and women.
>
> Nor is the present law sensible in its treatment of women, even without any comparison with men. If a man negligently backs his car over his wife's left hand, crushing it and doing it permanent injury, then she can obtain compensation from him, or his insurers, for the damaged wedding ring, but not for the crushed hand. On the basis of my opinion in the present appeal, if the accident occurred before the wedding day then she could recover for both the engagement ring and the crushed hand, even after the marriage.

He concluded by stating, "Surely it is time for British Columbia to remedy the legislative mistakes of 1888."[2]

We agree with these sentiments, and the question arises as to whether the approach to reform should be the same as that adopted in other jurisdictions, namely outright abolition of the immunity rule, or whether reform should attempt to correct the more obvious difficulties and anomalies in the present law. Needless to say, outright abolition would in itself achieve that end. Whether or not the rule should be abolished turns on the persuasiveness of the arguments that are advanced in support of its retention. These arguments are considered below.[3]

1. Domestic Harmony

A principal reason in support of the rule is said to be that interspousal tort liability would disrupt domestic tranquility, destroying the peace and harmony of the home.[4] Prosser has commented on this reasoning as follows:[5]

> This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy . . . for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

He then cites a rather extreme example of this point of view, a ninteenth century decision where it was stated with regard to suits between spouses:[6]

> The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of

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[1] *Landstrom* v. *Ringrose*, (1981) 27 B.C.L.R. 339, 352 (B.C.C.A.).

[2] *Ibid.* at 354.

[3] While most modern commentators are in favour of abolition of interspousal immunity in tort, a spirited defence was recently advanced in its support in one recent article: *see* Dr. Marvin M. Moore, *The Case for Retention of Interspousal Tort Immunity*, 47 Ohio Northern U. L. Rev. 943 (1980).

[4] The editor of Salmond on the *Law of Torts*, (16th ed.) notes at 448 that "actions between spouses were *once* thought "to be unseemly and undesirable."

[5] Prosser, *The Law of Torts*, (3rd ed., 1964), 883.

[6] *Ritter* v. *Ritter*, (1858) 31 Pa. 396.

> universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty and murders.

While such language and extreme views would probably be eschewed today, there are still those who would be disturbed about the effect that abolition of the rule might have on marital relationship. In a recent decision of the Alberta Court of Appeal,[7] for example, Clement J.A. commented as follows:[8]

> In my view the family unit is still fundamental to the structure of our social institutions. I do not think it is a proper function of this Court to choose to assist in any way in its fragmentation. Here, the plaintiff chose to marry the third party and has pressed no claim against him. The defendants can make whatever point is open to them on the facts, without forcing one spouse into litigation involving the other. Such a course is unnecessary and in my view undesirable.

While we would be the first to agree that preservation of the family unit and domestic harmony is a worthwhile goal, we do not believe that the immunity rule is an appropriate or proper means of achieving that goal. The need to preserve domestic harmony has not led to the preclusion of suits between spouses in contract. Nor, as Fleming points out, has the need to preserve domestic harmony been credited with sufficient weight to proscribe actions between parent and child. Indeed "the commission of intentional wrongs is often proof enough that there is no domestic tranquility left to be preserved."[9] Fleming points out that claims for unintended injury are unlikely to be prosecuted within the family, unless the putative tortfeasor is insured:[10]

> . . . in which event he is in no real sense an adversary, but only a nominal party to the litigation, and the real objection far from being its tendency to weaken the marriage bonds is that the intimate relation between the parties is apt to encourage collusion against the insurer.

We examine the "collusion" argument later.

Finally, as Mr. Justice Lambert pointed out in *Landstrom* v. *Ringrose*:[11]

> If the Ontario Court of Appeal is right in *Manning* v. *Howard*, as I think it is, then the problems relating to torts occurring during marriage are susceptible to a solution. All that is required is to get a divorce or an annulment. The wife is then entitled to sue for all the torts that occurred during the marriage but which are not barred by the *Limitations Act*. The husband has the same rights. This solution will work for the usual run of marital torts, such as assault, battery, deceit and defamation.

Thus, rather than promoting domestic harmony, the rule could be said to provide an incentive to end a marriage.

2. Benefiting From Own Wrongful Conduct

Where a spouse who does a a wrong to the other spouse is insured, it could be suggested that if the immunity did not exist the insured spouse would benefit from his or her own wrong, since the insurance monies would form part of the family funds.[12] In addressing this argument, Mendes Da Costa has said:[13]

> In such circumstances it is of course possible to contend that damages paid to a wife form, in general, part of the family funds; and that, therefore, if suit were permitted the result would be to allow a husband to benefit as a result of his own tort. But this reasoning may have equal application to damage awards made, in analogous situations, to other members of the family. In any event to so argue is to

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[7] *Bourbeau* v. *Szabo*, (1978) 5 Alta. L.R. (2d) 372.

[8] *Ibid.* at 382.

[9] John G. Fleming, *The Law of Torts*, 592 (4th ed.).

[10] *Ibid.* at 593.

[11] *Supra*, n. 1 at 353.

[12] Institute of Law Research and Reform, The University of Alberta, *Report No. 33, Interspousal Tort Immunity*, (1979) 17-19.

[13] *Husband and Wife in the Law of Torts*, in *Studies in Canadian Tort Law*, (1968) ed. by A. M. Linden, 473.

> lose sight of the fact that damages are awarded to compensate the injured wife; and compensation should not be denied merely on the basis that as a fact of family life, an accretion to the family funds may benefit both spouses.

The Alberta Institute of Legal Research and Reform also noted that if inter-spousal tort immunity is abolished, most tort claims between spouses will arise where there is insurance coverage and this will occur mainly in motor vehicle accidents, and said:[14]

> In a considerable proportion of cases, even though the driver-spouse is negligent, it would be difficult to categorize the momentary inadvertence which causes injury to the passenger spouse as culpable or blameworthy in a moral sense. Therefore, we do not believe that in general a valid argument can be made that abolition of inter-spousal tort immunity would enable a wrongdoer to obtain an indirect advantage from his or her wrongful conduct. Even in those cases in which a spouse's conduct is morally blameworthy, we think that compensation should not be denied. In most cases, the largest part of the damages awarded is to compensate either for loss of wages and of earning capacity or for medical expenses and future care. There is no net monetary gain in regard to that part of such damage awards. Where a part of the damages awarded is for pain and suffering or other non-pecuniary damage, there will be a net monetary gain but it is intended only to be compensatory. The theoretical possibility that general damages may redound occasionally to the benefit of a wrongdoing spouse through an increase in family funds should not stand in the way of providing true compensation to injured spouses generally.

We agree with these views.

3. Collusion

It can be argued that interspousal tort immunity is necessary on the ground that it prevents collusion and fraud where the tortfeasor spouse is insured. The validity of this argument, however, has been questioned. Fleming, for example, has stated:[15]

> . . . are we justified in being so distrustful of the inability of our judicial institutions to detect fraudulent or fancied claims that it is better to foreclose all redress even for the deserving? The immunity, under modern conditions, assures not freedom from harassing litigation to a spouse, but a windfall to his insurance company which may arrogate to itself all his personal privilege in order to duck its proper function of compensating casualties within the risk it assumed and foiling effective distribution of such losses.

The Law Reform Commission of Saskatchewan has expressed the following view:[16]

> Not only is this fear probably largely unwarranted but, in any event, to deal with it as a blanket exclusion from coverage is an example of legislative "overkill." It overcomes any problems of collusion at too great a price, namely, by barring insurance recovery in those cases where there is negligence and no collusion.

Others have pointed out that there are many other situations where there is potential for a collusive tort claim such as actions by fiances, children and close friends, and actions by a wife where her separate property is involved.[17] The possibility of collusion has not led to a corresponding immunity in these situations.

The Manitoba Law Reform Commission noted that cases of collusion would be relatively rare, since they would occur only where the spouse was insured, not legally liable, dishonest, undeterred by the fear of criminal prosecution for perjury and there was no other tortfeasor upon whom the full blame could be placed.[18]

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[14] *Supra*, n. 12 at 18.

[15] *Supra*, n. 9 at 593.

[16] *Proposals for Reform of the Law Affecting Liability between Husband and Wife and Related Insurance Contracts*, (1979) 11.

[17] *See, e.g.*, S. J. Bailey, *Intrafamily Tort Immunity*, (1978) 16 Alta. L. Rev. 417, 436.

[18] Manitoba Law Reform Commission, *Report on the Abolition of Inter-Spousal Immunity in Tort*, (1972) 4.

The text set out above reflects the discussion in our Working Paper. We went on to say:[19]

> We are also of the view that where insurance exists, there is a risk of collusion but that this is a distinctive issue and that it should not, by itself, be considered sufficient justification for retaining interspousal immunity in tort.

The "collusion issue" prompted the following comments from respondents to our Working Paper:

> One spouse . . . will not sue the other unless there is an advantage to both in doing so. In the usual case that advantage will be recovery under a policy of third party liability insurance. In a law suit in relation to the liability there will not be a true adversary situation. The injured spouse will say that the other spouse was negligent. The non-injured spouse will concede the negligence. He or she will be eager to demonstrate how careless he or she was. We do not think that . . . collusion is a problem in relation to the staging of artificial claims or the exaggeration of injuries. We believe that the problem lies in the fact that the spouse accused of negligence has no interest in denying the accusation and every interest in agreeing with the allegation.[20]

and

> We have some observations on the problem of collusion between spouses in presenting a fraudulent claim. It is extremely unlikely that anyone would risk possible serious injury in order to present a fraudulent tort claim to the insurer of his or her spouse. Collusion will most likely exist in injuries such as minor whiplash. With minor injuries, it may be very difficult to discover whether or not the injury is of the extent claimed or whether or not the accident was purposely staged or indeed occurred at all.

A spokesman for an insurer also pointed out that the possibility of collusion will, to some extent, lead to increased investigation costs which would not be present where an injury is inflicted on a "stranger." He also observed that:

> Since the vast majority of cases are settled short of litigation, and litigation is expensive to all parties, the burden of detection of fraudulent claims . . . will rest on the . . . [insurer] . . . not on the courts as suggested by . . . Fleming.

We remain sensitive to the view that collusive claims may arise from time to time where insurance is involved. In a sense, however, that problem already exists with respect to claims by other family members which are not barred by an immunity rule. If the possibility of collusive claims, *per se*, justifies immunity between spouses then a logical step is to create a further immunity to bar claims by children against parents and vice versa. We doubt if such an extention would be widely acceptable.

We adhere to the view that the possibility of collusion, while very real, does not by itself justify the retention of interspousal immunity in tort.

4. Increase in Insurance Premiums

Abolition of interspousal immunity in tort would have the greatest impact in actions arising out of injuries suffered in motor vehicle accidents. The question therefore arises whether abolition of the immunity would have any appreciable effect on motor vehicle insurance premiums. One might expect that abolition of the immunity might lead to an increase in such premiums, providing of course that the policy itself does not exclude coverage for liability towards one's spouse. The Manitoba Law Reform Commission noted that if a potential liability is created without commensurately increasing the number of premium payers, it is predictable that there will be some increase in individual premiums.[21] That Commission, however, made enqu-

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[19] Law Reform Commission of British Columbia, Interspousal Immunity in Tort, 15 (Working Paper No. 34, 1982).

[20] In extreme cases the conduct described may amount to fraud or noncooperation which would permit the insurer to deny coverage.

[21] *Supra*, n. 19.

iries in Canada and the United Kingdom and concluded that the cost of abolishing interspousal immunity would not be significant. Indeed the Insurance Bureau of Canada replied to the Commission's enquiry that abolition would "have little, if any, effect on the cost of any form of liability insurance."[22]

In the Working Paper we concluded that:[23]

> The probability that insurance premiums might increase is not, in our view, a persuasive argument against abolition of the immunity. As to this, we agree with the Manitoba Commission who concluded that if there is any increase in the cost of insurance it would be "the true index of the present failure of justice in this regard and should be considered as a reasonable social cost to the motoring public."[24]

While one correspondent expressed concern that "the cost of the insurance under your proposed change in the law would be substantial," some specific figures were provided by the Insurance Corporation of British Columbia who made an effort to estimate the cost of the abolition of interspousal immunity in the context of motor vehicle claims.

The Corporation pointed out that while their own records do not contain data which would permit a precise projection, "based on studies in other jurisdictions and on some educated guesses" a figure was arrived at. In 1983, the cost to the Corporation of the abrogation of the rule would "be up to $6 million." We were told that this works out to about $3 per policy which would (likely) be passed on to policyholders.

Views may differ whether this cost is "substantial" or whether it is modest in the light of the expanded coverage that would result. We do not propose to enter such a debate, but are content to state our conclusion that the "cost" of reform is not so inordinately high that a retreat from full abolition of the immunity is justified on that basis alone.

B. Conclusion

We are unpersuaded by the various arguments that can be advanced in support of interspousal immunity in tort. We are of the view that the law in this regard is anachronistic, complex and riddled with anomalies. Accordingly, we have concluded that interspousal immunity in tort should be abolished in British Columbia.

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[22] *Ibid.* at 5. A similar enquiry was addressed to the Bureau by the Ontario Law Reform Commission, who received a similar response.

[23] *Supra*, n. 19 at 18.

[24] *Supra*, n. 18 at 8.

CHAPTER V PROPOSALS FOR REFORM

A. General

As we indicated in the previous chapter, the traditional arguments in support of interspousal tort immunity have not persuaded us that it should be retained and we have concluded that the immunity should be abolished.

The Commission recommends that:

1. Section 10 (3) of the Married Women's Property Act, *R.S.B.C. 1979, c. 252 be repealed and replaced by provision comparable to the following:*

> *Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.*

We also believe that section 10 (1) of the Act should be amended by striking out the words "including her husband." The amendment proposed above would make them redundant, and their continued presence in subsection (1) might mislead some readers as to the husband's rights with respect to his property.

The Commission recommends that:

2. Section 10 (1) of the Married Women's Property Act *be amended by striking out the words "including her husband."*

Section 10 of the Act, amended in accordance with recommendations number 1 and 2, would read:

> **Remedies of married women for protection and security of property**
>
> **10.** (1) Every married woman shall have in her own name against all persons the same remedies for the protection and security of her own separate property as if the property belonged to her as a single woman.
>
> (2) In proceedings under this section it is sufficient to allege that the property referred to in subsection (1) is the property of the married woman.
>
> (3) Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.
>
> (4) In proceedings under this section a husband or wife is competent to give evidence against each other.

We have also considered whether the court should be given discretion to stay what are essentially trivial or frivolous actions, as has been done in England. We do not believe that any specific power is required to stay proceedings in trivial actions.

A stay of proceedings might, however, be a useful way of discouraging claims brought upon the breakup of a marriage. Such claims might not be statute barred but would be "stale" in the sense that the conduct giving rise to the claim had been forgiven and both parties had regarded the matter as "over." Given the highly charged atmosphere which may surround a marital breakup it is conceivable that a party might choose to revive such a claim and pursue it from motives of vengeance or use it as a bargaining tool in achieving an increased financial settlement. There is something to be said for giving the courts the power to stay proceedings in these circumstances.

On the whole we are not convinced such a power is necessary. It appears that such a claim can be pursued now, once the marriage has terminated, and the court has no power to stay proceedings. So far as we are aware such actions are not now being brought for improper motives nor are we aware of any call for reform in this regard.

A discretion to stay proceedings has been rejected in several jurisdictions where the immunity has been examined. Under the current law the court

cannot restrain proceedings by a wife for the protection of her separate property or proceedings in an action between spouses for breach of contract. We find it difficult to justify treating actions in tort any differently.

B. Consequential Reforms

1. The Negligence Act

Section 5 of the *Negligence Act*[1] provides:

> **Negligence of spouse**
>
> **5.** In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity shall be recoverable for the portion of loss or damage caused by the fault or negligence of that spouse, and the portion of the loss or damage caused by the fault or negligence of that spouse shall be determined although that spouse is not a party to the action.

The origin of section 5 was described by Lambert J.A. in *Landstrom* v. *Ringrose*:[2]

> It is common ground that the section was enacted in British Columbia in 1951 to overrule the decision in *Ferguson* v. *Macdonald* [1949] 2 W.W.R. 1130, which followed *Macklin* v. *Young* [1933] S.C.R. 603 and decided that where a wife injured in a collision between two vehicles, one of which was driven by her husband, and both drivers were at fault, she could recover the full amount of her damages from the driver who was not her husband, and he could not obtain any contribution or indemnity from her husband.

This was because, as a result of interspousal immunity in tort, the husband was not and could not be found liable to the wife jointly and severally with the other driver, and the *Contributory Negligence Act*, as it was then entitled, only provided for contribution and indemnity in the case of joint and several liability. As Lambert J.A. went on to point out:[3]

> As a result of the enactment of [s. 5], in a fact situation like that in *Ferguson* v. *Macdonald*, the wife would only recover from the driver who was not her husband that portion of her damages that was equivalent to the degree of fault attributable to the driver who was not her husband. Of course she would recover nothing from her husband.

If spousal immunity in tort is abolished, section 5 would no longer be necessary. We therefore recommend that it be repealed.

The Commission recommends that:

3. Section 5 of the Negligence Act, *R.S.B.C. 1979, c. 298 be repealed.*

2. Insurance Legislation

(a) Statutory Exclusions

Section 240 of the *Insurance Act*[4] provides:

> **Exceptions from liability**
>
> **240.** The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability
>
> (b) resulting from bodily injury to or the death of
>
> (i) the daughter, son, wife or husband of any person insured by the contract while being carried in or on or entering or getting on to or alighting from the automobile; or
>
> (ii) any person insured by the contract;

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[1] R.S.B.C. 1979, c. 298.

[2] (1981) 27 B.C.L.R. 339, 355 (B.C.C.A.).

[3] *Ibid.*

[4] R.S.B.C. 1979, c. 200.

A similar provision exists or existed in the insurance statutes of other Provinces, and it has been adversely commented upon by those agencies that have considered interspousal immunity. The Manitoba Law Reform Commission pointed out:[5]

> To leave this provision intact after abolishing spousal immunity would leave one of the most significant sources of spousal litigation unaltered in a practical sense. There is no point reforming the law of spousal immunity in automobile accident cases if the effect of the change is nullified by "*The Insurance Act*". The Ontario Law Reform Commission recognized this fact, and proposed that the equivalent section in the Ontario insurance legislation be repealed.

Similar views were expressed by the Law Reform Commission of Saskatchewan.[6] Repeal of such provisions has therefore been recommended in Ontario,[7] Manitoba[8] and Saskatchewan.[9] The Ontario equivalent of section 240 (b) of the *Insurance Act* was repealed at the same time as the abolition of interspousal tort immunity.[10] In Manitoba, however, the equivalent section in the Manitoba *Insurance Act* was not repealed at the time that interspousal immunity in tort was abolished.

In the Working Paper we proposed that section 240 (b) of the *Insurance Act* be repealed.[11] One respondant noted that our discussion leading up to that proposal was directed at the interspousal immunity aspect of the provision. This prompted him to comment:

> You recommend that section 240 (b) of the *Insurance Act* be repealed but in your comments you quote section 240 (b) (i) and refer to amendments to the equivalent section in the Ontario Insurance Act. You will note that section 240 (b) includes two subparagraphs (i) and (ii). We assume you are intending the repeal of the whole of (b) and we would support this. In case you are not, we would like to bring to the attention of the Commission an anomaly which might arise if only section 240 (b) (i) is repealed, as was done in Ontario in 1975, without repealing subparagraph (ii). That has since been corrected by the repeal of subparagraph (ii).
>
> The problem may be illustrated as follows. If a wife is an occupant in a car owned and insured in the name of her husband and is injured by his negligence, she can sue him and will recover under his policy if subparagraph (i) is deleted. If, however, the wife is the occupant of her own car which is being driven by her husband is injured as a result of his negligence, she would be able to sue him but she would not be able to recover under the automobile policy because of the fact that she is a person insured by the contract, if subparagraph (ii) is not deleted. You can take a number of examples of this situation either related to a household where there is only one car owned and insured in the name of one person, or a household where there are separate cars owned and insured by the husband and wife. The same outcome occurs if both husband and wife are shown as the named insured because the insurer would not be liable for bodily injury to either as each would be a person insured by the contract.

The repeal of subparagraph (ii) was not a matter to which we gave detailed consideration at the time our Working Paper was prepared.

In a sense it raises issues beyond the scope of this Report. While its repeal would permit recovery when the automobile is driven by the spouse of the injured insured, it would also permit recovery if the driver was another family member—or even a stranger.

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[5] Manitoba Law Reform Commission, *Report on Abolition of Interspousal Immunity in Tort*, (1972) 11.

[6] Law Reform Commission of Saskatchewan, *Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts*, (1979).

[7] Ontario Law Reform Commission, *Report on Family Law: Part I: Torts*, (1969).

[8] *Supra*, n. 5.

[9] *Supra*, n. 6.

[10] S.O., 1975, c. 41, s. 5.

[11] Law Reform Commission of British Columbia, Interspousal Immunity in Tort, 22 (Working Paper No. 34, 1982).

On balance we think the repeal of subparagraph (ii) makes good sense and would avoid the creation of an anomaly that would require attention in any event. This was also the view of the Manitoba Law Reform Commission:[12]

> Such a change would go somewhat beyond the realm of spousal immunity, since it would also wipe out the exclusion of children from coverage, but there seems no reason to treat children differently from spouses.

We believe that section 240 (b) should be repealed in its entirety.

The Commission recommends:

4. Section 240 (b) of the Insurance Act *be repealed.*

In British Columbia, repeal of section 240 (b) of the *Insurance Act* would not in itself be sufficient as that Act does not apply to the Insurance Corporation of British Columbia, nor does it govern the universal compulsory liability motor insurance which is provided by and must be obtained through the Corporation.[13] The Corporation enjoys a similar, though more limited, exemption by virtue of a regulation made pursuant to section 47 of the *Insurance (Motor Vehicle) Act*.[14] The regulation provides:

> 6.11. The corporation shall not indemnify an insured driver pursuant to this part for loss or damage resulting from bodily injury to or the death of the spouse of the insured driver arising from the use or operation of a motor vehicle by such insured driver;

This regulation should be repealed.

The Commission recommends that:

5. Insurance (Motor Vehicle) Act *Regulation No. 6.11 be repealed.*

(b) Contractual Exclusions

Third party liability insurance is merely an agreement by the insurer to indemnify the insured against loss suffered as a result of his being found liable to a third party. Thus as the Ontario and Manitoba Law Reform Commissions pointed out it would not be sufficient merely to make these repeals, because insurers could simply write a similar exemption into their policies.[15] Both these Commissions recommended that a statutory provision should be enacted declaring that family members shall not be excluded from insurance coverage.

In the United States at least one jurisdiction, Wisconsin, has enacted a provision prohibiting family exclusion clauses in motor vehicle insurance policies.[16]

We have concluded that a provision similar in effect should be enacted in British Columbia. We recognize that such a provision would infringe upon the right of persons to contract freely. In British Columbia, however, freedom of contract in respect of compulsory third party liability motor vehicle insurance is illusory, because the Insurance Corporation of British Columbia is the only insurer that can by law provide such insurance.

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[12] *Supra*, n. 5.

[13] *Insurance Corporation Act*, R.S.B.C. 1979, c. 201, s. 37 and *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, s. 9.

[14] *Ibid.*

[15] *Supra*, n. 5 and n. 7.

[16] Section 632.32(6)(b)1. Wis Stats. A similar provision was enacted in Minnesota in 1971 but was repealed in 1975 when that State's "no fault" insurance law became effective. We have been informed by the Insurance Division of the Department of Commerce for that State that:

> We do not believe it was the intent of our Legislature to return to the use of family exclusion provisions when the no-fault law was enacted. Thus, we have not approved the use of such exclusionary provisions in auto insurance policies (which are subject to our approval) since 7-1-71.

It is interesting to note that in Michigan it was recently held that family exclusion clauses are unauthorized and inconsistent with the legislative purpose of comprehensive automobile liability insurance, and are therefore invalid: *Community Service Ins. Co. v. Shears*, (1979) 280 NW 2d 532.

The Commission recommends that:

6. Provisions be added to the Insurance Act, *and the* Insurance (Motor Vehicle) Act, *prohibiting the exemption from liability, under motor vehicle insurance policies, for personal injuries to members of the insured's family.*

Motor vehicle insurance policies are not the only types of insurance policy which provide or may provide coverage in respect of third party liability. In many homeowner's policies it is common for such coverage to be provided in addition to coverage for loss or damage to the home or its contents. It is also common for such policies to contain a clause excluding from coverage family members living in the same household ("family exclusion clauses"). The question arises whether such clauses should also be prohibited.

At present, family exclusion clauses do not appear to have created any undue concern insofar as they have excluded coverage for liability to family members who can, under the present law, sue the insured, e.g., a mother or brother. In the light of this we are reluctant to speculate whether concern over such clauses will increase when interspousal immunity is considered. We merely note that our enquiries in England, where family exclusion clauses are also common in homeowner's policies, indicate that since the abolition of interspousal immunity in 1962 there has been no appreciable increase in public concern over the use of such clauses.

Liability insurance in homeowner policies is now offered invariably as a matter of course and is inexpensive. It is possible that if insurers were not permitted to incorporate "family exclusion" clauses in homeowner policies, they might no longer offer such liability insurance or, if they did, it would be at a much higher premium.

In the Working Paper no proposal was made for the prohibition of contractual exclusions in these policies. This troubled one respondent who was concerned that prohibiting exclusion clauses in one insurance context but not in another reflected an undesirable inconsistency of policy. We frankly acknowledge that an inconsistency would arise. We believe, however, that it is justified given the monopoly position of the Insurance Corporation of British Columbia with respect to auto insurance and the competitive nature of the insurance industry with respect to homeowner policies. We also invited comment on another possible refinement:[17]

> If there is some concern that family exclusion clauses can result in someone being exposed to a liability which he cannot insure against, a possible approach might be to permit insurers to include such clauses in their policies but require that they offer removal of the exclusion for an appropriate additional premium. We also invite comment on the desirability of this possible approach to the question.

That invitation attracted the following response.

> When I read this paragraph, I wondered whether my own policy contained a family exclusion clause. The answer was simply that I do not know whether it does or doesn't. I suspect that I am in the position of the vast majority of people who purchase household insurance policies insofar as I assumed that I was covered for all loss or injury suffered by anyone while on my premises, whether or not they were related to me. It will therefore be no surprise to you that I am in favour of taking some positive step to insure that policies which will insure for family losses are available. However I would go farther than you. I would invalidate any limitation of liability respecting family or spouses unless the insurance policy contains an express ackowledgement by the insured that they do not desire such coverage at the stipulated addition premium. In other words, I think that insurance companies should cover family or spouses as the norm, and where an insurance

[17] *Supra*, n. 11 at 25.

> company seeks to so limit its liability, it should be permitted to do so only if it has offered such coverage to an insured, and the insured has declined to pay the premium for that coverage.

The need for some kind of notice to the insured was echoed in another submission:

> [I]f there is to be an exclusion in home owner policies but no exclusion in automobile policies then . . . the exclusion in home owner policies should be particularly drawn to the attention of the policy owner at the time when he pays the premium so that he is not mislead on this point by having become used to the lack of exclusion in his automobile policy.

Our own view is that any measures such as those suggested would be premature. It would be useful to see how our recommendations work in practice and how the insurance industry reacts. Moreover, this issue raises the broader question whether it is appropriate to compensate persons for injuries caused *intra*-family through litigation on a fault basis. It might, for instance, be more appropriate to encourage the development of "first party" insurance schemes to compensate family members in such circumstances.

C. Transition

A final question is whether legislation implementing our recommendations should have any retrospective effect. In our view it should not. Persons who have arranged their affairs in reliance on the present law should not have those arrangements upset by the retrospective operation of this legislation. Similarly, insurers which have created "reserves" to meet their past liabilities should not be forced to increase them to meet claims which arose at a time when the premium charged for did not reflect the additional liability. We acknowledge that if the legislation has prospective effect only, a few "hard cases" may arise. We do not, however, believe this possibility outweighs the advantages, both in terms of principle and of practical results of giving the legislation prospective effect only.[18]

The Commission recommends that:

7. Legislation implementing recommendations 1 to 5 should apply only to causes of action arising after that legislation comes into force.

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[18] In Ontario, where interspousal immunity has been abolished, the Courts have arrived at the same conclusion without the aid of a provision which specifies that the abolition is not to have retrospective effect. *See Fox* v. *Fox*, (1978) 20 O.R. (2d) 747 (Ont. C.A.). *See also Bingeman* v. *McLaughlin*, [1978] 1 S.C.R. 548.

CHAPTER VI CONCLUSION

A. General

This Report has been confined to an examination of that part of the *Married Woman's Property Act* that relates to interspousal immunity in tort. This does not mean that we regard all other aspects of the Act as satisfactory. It is our provisional view that the Act could undergo substantial revision to simplify it and to bring it more into line with the expectations of married persons today. The current Act has remained substantially unaltered since 1887. Other jurisdictions in Canada, however, have adopted the *Uniform Married Women's Act*, a simplified version of the Act promulgated by the Uniform Law Conference.[1] Both Ontario and Prince Edward Island have repealed their respective *Married Women's Property Acts*, replacing them with provisions which establish, more concisely, that each spouse has a legal personality separate and distinct from that of the other spouse.[2] Indeed, as we mentioned earlier, in British Columbia, a Bill was introduced in 1973 which would have been of similar effect.[3] This Bill, however, never received second reading.

In view of our current commitments, however, we cannot at this time give priority to a wider project on the *Married Women's Property Act*.

B. Summary of Recommendations

Our recommendations are as follows:

1. Section 10 (3) of the *Married Women's Property Act*, R.S.B.C. 1979, c. 252 be repealed and replaced by provision comparable to the following:

> Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.

(Page 11)

2. Section 10 (1) of the *Married Women's Property Act* be amended by striking out the words "including her husband." **(Page 11)**

3. Section 5 of the *Negligence Act*, R.S.B.C. 1979, c. 298 be repealed. **(Page 12)**

4. Section 240 (b) of the *Insurance Act*, R.S.B.C.1979, c. 200 be repealed. **(Page 14)**

5. *Insurance (Motor Vehicle) Act*, Regulation No. 6.11 be repealed. **(Page 14)**

6. A provision be added to the *Insurance Act*, and the *Insurance (Motor Vehicle) Act*, prohibiting the exemption from liability, under motor vehicle insurance policies, for personal injuries to members of the insured's family. **(Page 15)**

7. Legislation implementing recommendations 1 to 5 should apply only to causes of action arising after that legislation comes into force. **(Page 16)**

C. Acknowledgements

We wish to thank all those who took the time to consider and respond to the Working Paper which preceded this Report. We also wish to thank the

[1] These jurisdictions are Manitoba, New Brunswick, North West Territories and the Yukon.

[2] *See Family Law Reform Act*, S.O. 1978, c. 2, and *Family Law Reform Act*, S.P.E.I. 1978, c. 6.

[3] 1973 (2nd Session) Bill No. 1, the full text is set out in Appendix B.

Insurance Corporation of British Columbia for their assistance in providing estimates as to the "cost of reform" with respect to automobile insurance.

While this Report reflects the conclusions of the Commission as presently constituted, we wish to acknowledge the contribution of Mr. Peter Fraser, a former member of the Commission who participated in the development of the Working Paper.

Finally, we wish to acknowledge the contribution of Anthony J. Spence, former Counsel to the Commission. He carried the burden of research and, subject to direction from the Commission, drafted the Working Paper. We thank him for his contribution to this Report.

JOHN S. AIKINS
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BRYAN WILLIAMS
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APPENDICES

Appendix A

LAW REFORM (HUSBAND AND WIFE) ACT 1962

CHAPTER 48

An Act to amend the law with respect to civil proceedings between husband and wife.

[1st August, 1962]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Actions in tort between husband and wife.

1.—(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married.

(2) Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may stay the action if it appears—

(*a*) that no substantial benefit would accrue to either party from the continuation of the proceedings; or

(*b*) that the question or questions in issue could more conveniently be disposed of on an application made under section seventeen of the Married Women's Property Act, 1882 (determination of questions between husband and wife as to the title to or possession of property);

45 & 46 Vict c. 75.

and without prejudice to paragraph (*b*) of this subsection the court may, in such an action, either exercise any power which could be exercised on an application under the said section seventeen, or give such directions as it thinks fit for the disposal under that section of any question arising in the proceedings.

(3) Provision shall be made by rules of court for requiring the court to consider at an early stage of the proceedings whether the power to stay an action under subsection (2) of this section should or should not be exercised; and rules under the County Courts Act, 1959, may confer on the registrar any jurisdiction of the court under that subsection.

7 & 8 Eliz. 2. c. 22.

(4) This section does not extend to Scotland.

Proceedings between husband and wife in respect of delict.

2.—(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful or negligent act or omission, or for the prevention of a wrongful act, as if they were not married.

(2) Where any such proceedings are brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may dismiss the proceedings if it appears that no substantial benefit would accrue to either party from the continuation thereof; and it shall be the duty of the court to consider at an early stage of the proceedings whether the power to dismiss the proceedings under this subsection should or should not be exercised.

(3) This section extends to Scotland only.

Short title, repeal, interpretation, saving and extent.

3.—(1) This Act may be cited as the Law Reform (Husband and Wife) Act, 1962.

(2) The enactments described in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) The references in subsection (1) of section one and subsection (1) of section two of this Act to the parties to a marriage include references to the persons who were parties to a marriage which has been dissolved.

(4) This Act does not apply to any cause of action which arose, or would but for the subsistence of a marriage have arisen, before the commencement of this Act.

(5) This Act does not extend to Northern Ireland.

SCHEDULE

ENACTMENTS REPEALED

Session and Chapter	Short Title	Extent of Repeal
45 & 46 Vict. c. 75.	The Married Women's Property Act, 1882.	Section twelve, except so far as it relates to criminal proceedings. Section twenty-three.
25 & 26 Geo. 5. c. 30.	The Law Reform (Married Women and Tortfeasors) Act, 1935.	In section one, the words " and subject, as respects actions in tort between husband and wife, to the provisions of section twelve of the Married Women's Property Act, 1882 ".

Appendix B

MARRIED PERSONS EQUALITY ACT

HON. ATTORNEY-GENERAL.

BILL

No. 1] [1973 (Second Session)

Married Persons Equality Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Repeals *Married Women's Property Act.*

1. The *Married Women's Property Act*, being chapter 233 of the *Revised Statutes of British Columbia, 1960*, is repealed.

Amends *Family Relations Act.*

2. The *Family Relations Act*, being chapter 20 of the Statutes of British Columbia, 1972, is amended

(a) by repealing subsection (1) of section 6, and substituting the following:

Equality of married persons.

6. (1) Notwithstanding any rule of law or equity, but subject to any express provision in this or any other Act, no person shall, by reason only of his marriage,

(a) suffer any loss of capacity to sue any person or to be sued; or

(b) suffer any loss of capacity to contract; or

(c) be deprived of any interest in property to which such person is entitled or becomes entitled in any capacity; or

(d) become liable for the contracts, debts, or wrongs of the other party to the marriage; and

(b) in subsection (2) of section 6, by striking out the words "Notwithstanding clause (b)," in the first line.

Commencement.

3. This Act comes into force on the first day of January, 1974.

Printed by K. M. MacDonald, Printer to the Queen's Most Excellent Majesty in right of the Province of British Columbia.
1973

EXPLANATORY NOTES

The purpose of the Bill is to repeal the *Married Women's Property Act* and to amend the *Family Relations Act*. The thrust of the amendment is to remove these disabilities and obligations automatically imposed at common law by reason of marriage.

(This statement is submitted by the Legislative Counsel and is not part of the legislation.)

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Victoria, 1983